Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service	)	WT Docket No. 00-239

COMMENTS
of the
ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES

I. INTRODUCTION

The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) hereby submits these comments in response to the Commission's Public Notice[1] seeking comment on the Petition for Reconsideration and Clarification filed by the State Independent Alliance and the Independent Telecommunications Group (Independents). OPASTCO is a national trade association representing over 500 small telecommunications carriers serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve over 2.5 million customers.

[1] *Wireless Telecommunications Bureau Seeks Comment on Petition for Reconsideration and Clarification of Commission Order Regarding Western Wireless' Basic Universal Service Offering in Kansas,* **WT Docket No. 00-239, Public Notice, DA 02-2266 (rel. Sept. 16, 2002).**

All of OPASTCO's members are rural telephone companies as defined in 47 U.S.C. §153(37).

OPASTCO strongly supports the Independents' Petition for Reconsideration and Clarification. Western Wireless' Basic Universal Service (BUS) offering is a fixed service and should not be classified as a Commercial Mobile Radio Service (CMRS). The Independents' Petition correctly explains that the BUS terminal does not conform with the statutory definition of a mobile station as it does not "ordinarily" move, using the common usage definition of the word. Furthermore, the classification of BUS as an "incidental" service that uses the same network as another mobile service does not allow the Commission to ignore the statutory definition of a "mobile station" and regulate a fixed service as mobile. Finally, irrespective of the Commission's decision on reclassification of the BUS offering, it is important that it affirm the right of states to support equal access and other additional services through a voluntary state universal service support program.

II. THE COMMISSION HAS IMPROPERLY APPLIED THE STATUTORY DEFINITION OF A "MOBILE STATION," AS THE BUS TERMINAL EQUIPMENT CANNOT REASONABLY BE SAID TO "ORDINARILY" MOVE

In order for a telecommunications service to be classified as CMRS, it must meet the statutory definition of a "commercial mobile service."[2] A "mobile service,"[3] in turn, relies upon the use of "mobile stations," which the Communications Act defines as "radio-communication station[s] capable of being moved and which ordinarily do

[2] 47 U.S.C. § 332(d)(1).

[3] 47 U.S.C. § 153(27).

move."[4] The Independents' Petition clearly demonstrates that the BUS offering cannot reasonably be classified as CMRS using the common usage definition of the word "ordinarily."

To begin with, the Independents' Petition' correctly indicates that two of the four FCC Commissioners have, at the very least, expressed doubt with the Order's determination that the BUS offering "ordinarily" functions as a mobile service.[6] More specifically, Commissioner Abemathy stated that:

> Given that the equipment is relatively large and heavy compared to most of today's mobile units, it operates on AC power and has only limited backup battery life, and it is designed to be used in conjunction with a traditional wireline telephone (that is, it has no integrated earpiece, speaker, or mouthpiece), it *seems* that consumers will not ordinarily use the Telular terminal in a mobile fashion.[7]

Commissioner Martin was even more emphatic in his disagreement with the Order's conclusion: "I believe this device is too large, too heavy, and too lacking in mobile usefulness for a reasonable person to find that it "ordinarily" moves as do other wireless devices."[8]

The BUS Order states that the unit's capability of moving is a significant indicator that mobile use is an intended ordinary use.[9] This is an illogical interpretation

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[4] 47 U.S.C. § 153(28) (emphasis added).

[5] Independents' Petition, pp. 2, 5.

[6] *See, Pefifionof the State Independenf Alliance and the Independenf Telecommunications Groupfor a Declaratory Ruling that fheBasic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service*, WT Docket No. 00-239, Memorandum Opinion and Order, FCC 02-164, paras. 18-20 (rel. August 2,2002). (BUS Order)

[7] BUS Order, Concurring Statement of Commissioner Kathleen Q. Ahemathy.

[8] *Ibid.*. Dissenting Statement of Commissioner Kevin J. Martin

[9] BUS Order, para. 19.

of the law. As noted above, the statutory definition of a mobile station has two prongs: 1) mobile capability, and 2) ordinary mobile use. Obviously, Congress was of the belief that these were two separate criteria, for if satisfying the first was a near automatic indication that the second was also satisfied, then there would be no need for this second prong to begin with. Thus, as the Independents point out, the mere demonstration of mobile capacity to customers does not demonstrate ordinary use.[10]

The dictionary definition of "ordinary" means "customary, normal, and commonplace," not "capable" or even "reasonably likely."" There is nothing in the law to indicate that Congress intended anything other than the common usage, textbook definition of "ordinarily," when applying the statutory definition of a "mobile station." The Commission cannot stretch the everyday meaning of words contained within statutory definitions in order to achieve a particular outcome. Consequently, the Commission must reclassify BUS as a fixed service.

III. CLASSIFICATION OF THE BUS OFFERING AS "INCIDENTAL" DOES NOT ALTER THE FACT THAT IT FAILS TO MEET THE STATUTORY DEFINITION OF A COMMERCIAL MOBILE SERVICE AND THEREFORE SHOULD NOT IMPACT ITS PROPER CLASSIFICATION AS A FIXED SERVICE

The BUS offering has been classified by the Commission as an "incidental" service under Part 22."[12] However, this "incidental" designation does not entitle the Commission to treat a futed service offering as CMRS, its rules notwithstanding. As the

[10] Independents' Petition, p. 6. Also, as OPASTCO stated in earlier comments, "ordinary use of the mobile station must be for mobile purposes; it is not sufficient that the station is *capable* of being moved, or even that it *occasionally* moves." *See,* OPASTCO Comments, In the Matter of *State Independenf Alliance and Independenf Telecommunicalions Group Pefifion for Declaratory Ruling,* WT Docket No. 00-239 (fil. Dec. 21, 2000).

[11] *Ibid.,* p. 3.

[12] BUS Order, para. 27.

Independents correctly indicate, the act of classifying BUS as an "incidental" service does not grant the Commission the authority to "ignore the statutory definition of [a mobile] service which requires that it involve a mobile station and that the station must "ordinarily" move.[13]

Even though the BUS service may share the same spectrum and infrastructure with Western Wireless' conventional mobile service, the offering ultimately relies upon customer equipment which does not "ordinarily" move. Again, Commissioner Martin correctly assesses the situation, stating that "I do not *see* how the statute's definition of 'mobile' service can be read to encompass an entirely fixed service, merely because the fixed service uses the same network as a mobile one."[14]

In addition, the Commission's misuse of the "incidental" designation allows it to improperly expand its preemption authority, thereby preventing Kansas from exercising its right to regulate a fixed wireless substitute for wireline local exchange service." As the Independents' correctly point out, the Commission's authority in this area "must be strictly construed as there is no presumption of preemption beyond that intended by

The simple fact is, the BUS offering is a fixed service, since it does not comport with the statutory definition of a "mobile service." Designation as an "incidental" service cannot be used to circumvent proper regulatory classification and deny Kansas the ability to establish regulatory parity among directly competing services.

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[13] Independents' Petition, p. 10.

[14] BUS Order, Dissenting Statement of Commissioner Kevin J. Martin

[15] Independents' Petition, pp. 10-11.

[16] *Ibid.*, p. 11.

IV. THE COMMISSION SHOULD AFFIRM THE RIGHT OF STATES TO SUPPORT EQUAL ACCESS AND OTHER ADDITIONAL SERVICES AS PART OF THEIR OWN VOLUNTARY STATE UNIVERSAL SERVICE PROGRAMS

The Independents have convincingly demonstrated that the BUS offering does not meet the statutory definition of a "mobile service" and should therefore be classified as a fixed service. However, regardless of whether or not the Commission decides to reclassify the BUS offering, it should affirm the ability of Kansas and other states to support equal access and other services not supported by the federal universal service fund (USF) mechanism, through their own state universal service programs.

The BUS Order states that the Kansas Commission is barred from imposing entry, rate, or equal access requirements on CMRS carriers who are designated as ETCs.[17] However, conditioning the receipt of support from a voluntary universal service program on the provision of equal access or any other service, is in no way equivalent to a general requirement imposed upon a CMRS carrier." Moreover, Section 254(f) of the Telecommunications Act of 1996 specifically grants states the authority to "provide for additional definitions and standards to preserve and advance universal service within that state."" Classification of an ETC's service offering as CMRS should in no way preclude states from availing themselves of this statutory right.

In a recent decision, the Utah Supreme Court ruled that pricing conditions established for the receipt of state universal service support do not equate to rate

[17] BUS Order, paras. 30-31.

[18] Independents' Petition, p. 12.

[19] 47 U.S.C. § 254(f) (emphasis added).

regulation in violation of Section 332 of the Act.[20] In support of its decision, the Court noted that:

> An ETC becomes subject to the rate regulation requirement only after it chooses to seek state [universal service] funding. Because Utah [rate regulation] becomes applicable only under discrete, voluntary circumstances, the element of restriction or control is absent. It is therefore not rate regulation."

Similarly, the inclusion of equal access as a supported service does not equate to a general equal access obligation imposed upon all wireless carriers in violation of Section 332(c)(8) of the Act. The Independents have correctly pointed out that any CMRS carrier who is unwilling or unable to meet the service requirements of a voluntary USF program, retains the option to "withdraw [its ETC] application and avoid the responsibilities such designation entails."[22]

Moreover, the Commission's own universal service principle of competitive and technological neutrality[23] suggests that a state should have the freedom to condition the receipt of intrastate support funds to all carriers on the provision of whatever set of supported services that the state legislature and public utility commission deem to be in the public interest. This includes equal access to interexchange service.

Finally, because Congress assumed that all ETCs would be able to provide comparable service, it required state commissions to allow any carrier to relinquish its ETC designation in an area served by more than one ETC.[24] If an incumbent local

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[20] *WWC Holdings Co. Inc. v. Public Service Commission of Utah, et al,* Case No. 20000835, 2002 UT 23 (Filed March 5,2002). (Utah Decision)

[21] Utah Decision, para. 29

[22] Independents' Petition, p. 12.

[23] *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776,8801-8802, paras. 47-48 (1997).

[24] 47 U.S.C. § 214(e)(4).

exchange carrier (ILEC) were to relinquish its designation in an area where a CMRS provider had been designated and the state was not permitted to include equal access as a requirement for the receipt of state funds, consumers "w[ould] be faced with an involuntary degradation of service,"[25] as they would no longer have even the option of receiving equal access to interexchange service. It was not the intent of Congress for the introduction of competitive markets in rural service areas to result in declines in service quality for consumers. Thus, the Commission must not attempt to deny states their right to establish additional service requirements – particularly equal access – for the receipt of state universal service funds.

[25] Independents' Petition, p. 13

V. CONCLUSION

The Commission should reclassify the BUS offering as a fixed service, as it does not "ordinarily" move as required under the statutory definition of a "mobile service." *So* doing would ensure that Kansas retains the right to regulate the BUS offering as a functionally equivalent service to those offered by LECs within the state. However, regardless of the Commission's decision on reclassification, it should clarify that states are statutorily permitted to support equal access and other additional services through voluntary state universal service support programs.

Respectfully submitted,

THE ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES

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CERTIFICATE OF SERVICE

I, Jeffrey W. Smith, hereby certify that a copy of the comments by the Organization for the Promotion and Advancement of Small Telecommunications Companies was sent by first class United States mail, postage prepaid, on this, the **16th** day **of** October, **2002,** to **those** listed on the attached list.

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SERVICE LIST

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